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ARBITRATION OF OUTSTANDING PECUNIARY
CLAIMS BETWEEN GREAT BRITAIN AND
THE UNITED STATES OF AMERICA

THE FREDERICK GERRING, JR

ANSWER OF HIS MAJESTY'S GOVERNMENT

OTTAWA
GOVERNMENT PRINTING BUREAU
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ARBITRATION OF OUTSTANDING PECUNIARY CLAIMS

BETWEEN

GREAT BRITAIN AND THE UNITED STATES
OF AMERICA.

IN THE MATTER OF THE UNITED STATES CLAIM RESPECTING THE
FREDERICK GERRING, JR.

ANSWER OF HIS MAJESTY'S GOVERNMENT.

1. By the first article of the treaty concluded at London 20th October, 1818, between Great Britain and the United States it is stipulated as follows:—

ARTICLE I.

“Whereas differences have arisen respecting the liberty claimed
“by the United States for the inhabitants thereof, to take, dry,
“and cure fish on certain coasts, bays, harbours and creeks of
“His Britannic Majesty's dominions in America, it is agreed
“between the high contracting parties, that the inhabitants of the
“said United States shall have forever, in common with the sub-
“jects of His Britannic Majesty, the liberty to take fish of every
“kind on that part of the southern coast of Newfoundland which
“extends from Cape Ray to the Rameau Islands, on the western
“and northern coast of Newfoundland, from the said Cape Ray
“to the Quirpon Islands on the shores of the Magdalen Islands,
“and also on the coasts, bays, harbours and creeks from Mount
“Joly on the southern coast of Labrador, to and through the
“Straits of Belleisle and thence northwardly indefinitely along the
“coast, without prejudice, however, to any of the exclusive rights
“of the Hudson Bay Company; And that the American fishermen
“shall also have liberty forever, to dry and cure fish in any of the
“unsettled bays, harbours and creeks of the southern part of the
“coast of Newfoundland hereabove described, and of the coast of
“Labrador; but so soon as the same, or any portion thereof, shall
“be settled, it shall not be lawful for the said fishermen to dry or

“cure fish at such portion so settled, without previous agreement
 “for such purpose with the inhabitants, proprietors, or possessors
 “of the ground. And the United States hereby renounce forever,
 “any liberty heretofore enjoyed or claimed by the inhabitants
 “thereof, to take, dry, or cure fish on or within three marine
 “miles of any of the coasts, bays, creeks or harbours of His Brit-
 “annic Majesty’s dominions in America not included within the
 “above mentioned limits; Provided, however, that the American
 “fishermen shall be admitted to enter such bays or harbours for
 “the purpose of shelter and of repairing damages therein, of
 “purchasing wood, and of obtaining water, and for no other pur-
 “pose whatever. But they shall be under such restrictions as
 “may be necessary to prevent their taking, drying or curing fish
 “therein, or in any other manner whatever abusing the privileges
 “hereby reserved to them.”

2. By the Imperial Statute 59 George III, Chapter 38, which received the Royal Assent on 14th June, 1819, it is provided as follows:—

“‘WHEREAS a Convention between His Majesty and the
 “‘United States of *America* was made and signed at *London*, on
 “‘the Twentieth Day of *October* One thousand eight hundred and
 “‘eighteen; and by the First Article of the said Convention, reciting
 “‘that Differences had arisen respecting the Liberty claimed by
 “‘the United States for the Inhabitants thereof to take, dry and
 “‘cure Fish in certain Coasts, Bays, *Harbours* and Creeks of His
 “‘*Britannic* Majesty’s Dominions in *America*, it is agreed, that the
 “‘Inhabitants of the said United States shall have for ever in com-
 “‘mon with the Subjects of His *Britannic* Majesty, the Liberty
 “‘to take Fish of every Kind on that Part of the Southern Coast of
 “‘*Newfoundland* which extends from *Cape Ray* to the *Rameau*
 “‘*Islands*, on the Western and Northern Coasts of *Newfoundland*,
 “‘from the said *Cape Ray* to the *Quirpon* Islands, on the Shores of
 “‘the *Magdalen* Islands, and also on the Coasts, Bays, Harbours
 “‘and Creeks from *Mount Joly* on the Southern Coasts of *Labrador*,
 “‘to and through the Straits of *Belleisle*, and thence northwardly
 “‘indefinitely along the Coast, without Prejudice however to any
 “‘of the exclusive Rights of the *Hudson’s Bay* Company; and it was
 “‘also by the said Article of the said Convention agreed, that the
 “‘*American* Fishermen should have liberty for ever to dry and cure
 “‘Fish in any of the unsettled Bays, Harbours and Creeks of the
 “‘Southern Part of the Coast of *Newfoundland* above described,

“ ‘and of the Coast of *Labrador*, but that so soon as the same, or
 “ ‘any Portion thereof, should be settled, it should not be lawful
 “ ‘for the said Fishermen to dry or cure Fish at such Portion so
 “ ‘settled, without previous Agreement for such Purpose with the
 “ ‘Inhabitants, Proprietors or Possessors of the Ground: And
 “ ‘Whereas it is expedient that His Majesty should be enabled to
 “ ‘carry into execution so much of the said Convention as is above
 “ ‘recited, and to make Regulations for that Purpose;’ Be it
 “ ‘therefore enacted by the King’s most Excellent Majesty, by and
 “ ‘with the Advice and Consent of the Lords Spiritual and Tem-
 “ ‘poral, and Commons, in this present Parliament assembled, and
 “ ‘by the Authority of the same, That from and after the passing of
 “ ‘this Act, it shall and may be lawful for His Majesty, by and with
 “ ‘the Advice of His Majesty’s Privy Council, by any Order or
 “ ‘Orders in Council, to be from time to time made for that Purpose,
 “ ‘to make such Regulations, and to give such Directions, Orders
 “ ‘and Instructions to the Governor of *Newfoundland*, or to any
 “ ‘Officer or Officers on that Station, or to any other Person or
 “ ‘Persons whomsoever, as shall or may be from time to time deemed
 “ ‘proper and necessary for the carrying into Effect the Purposes of
 “ ‘the said Convention, with relation to the taking, drying and
 “ ‘curing of Fish by Inhabitants of the United States of *America*,
 “ ‘in common with *British* Subjects, *within the Limits set forth in the*
 “ ‘*said Article of the said Convention*, and hereinbefore recited; any
 “ ‘Act or Acts of Parliament, or any Law, Custom or Usage to the
 “ ‘contrary in anywise notwithstanding.

“ II. And be it further enacted, That from and *after the passing*
 “ *of this Act* it shall not be lawful for any Person or Persons, *not*
 “ ‘being a natural born Subject of His Majesty, in any *Foreign*
 “ ‘Ship, Vessel or Boat, nor for any Person in any Ship, Vessel or
 “ ‘Boat, other than such as shall be navigated according to the Laws
 “ ‘of the United Kingdom of *Great Britain and Ireland*, to fish for
 “ ‘or to take, dry or cure any Fish of any Kind whatever, within
 “ ‘Three Marine Miles of any Coasts, Bays, Creeks or Harbours
 “ ‘whatever, in any Part of His Majesty’s Dominions in *America*,
 “ ‘*not included* within the Limits specified and described in the First
 “ ‘Article of the Said Convention, and hereinbefore recited; and
 “ ‘that if any such Foreign Ship, Vessel or Boat, or any Persons on
 “ ‘board thereof, shall be found fishing, or to have been fishing, or
 “ ‘*preparing to fish* within such Distance of such Coasts, Bays,
 “ ‘Creeks or Harbours, within such Parts of His Majesty’s Domin-
 “ ‘ions in *America* or of the said Limits as aforesaid, *all such Ships*,
 41079—2½

“Vessels and Boats, together with their Cargoes, and all Guns, Ammunition, Tackle, Apparel, Furniture and Stores, *shall be forfeited*, and shall and may be seized, taken, sued for, prosecuted, recovered and condemned by such and the like Ways, Means and Methods, and in the same Courts, as Ships, Vessels or Boats may be forfeited, seized, prosecuted and condemned for any Offence against any Laws relating to the Revenue of Customs, or the Laws of Trade and Navigation, under any Act or Acts of the Parliament of *Great Britain*, or of the United Kingdom of *Great Britain and Ireland*; provided that nothing in this Act contained shall apply, or be construed to apply to the Ships or Subjects of any Prince, Power or State in Amity with His Majesty, who are entitled by Treaty with His Majesty to any Privilege of taking, drying or curing Fish on the Coasts, Bays, Creeks or Harbours, or within the Limits in this Act described.

“III. Provided always, and be it enacted, That it shall and may be lawful for any Fisherman of the said United States to enter into any such Bays or Harbours of His *Britannic* Majesty's Dominions in *America* as are last mentioned, for the purpose of Shelter and repairing Damages therein, and of purchasing Wood and of obtaining Water, and for no other Purpose whatever; subject nevertheless to such Restrictions as may be necessary to prevent such Fishermen of the said United States from taking, drying or curing Fish in the said Bays or Harbours, or in any other manner whatever abusing the said privileges by the said Treaty and this Act reserved to them, and as shall for that purpose be imposed by any Order or Orders to be from time to time made by His Majesty in Council under the Authority of this Act, and by any Regulations which shall be issued by the Governor or Person exercising the Office of Governor in any such Parts of His Majesty's Dominions in *America*, under or in pursuance of any such Order in Council as aforesaid.

“IV. And be it further enacted, That if any Person or Persons, upon requisition made by the Governor of *Newfoundland*, or the Person exercising the Office of Governor, or by any Governor or Person exercising the Office of Governor, in any other Parts of His Majesty's Dominions in *America* as aforesaid, or by any Officer or Officers acting under such Governor or Person exercising the Office of Governor, in the Execution of any Orders or Instructions from His Majesty in Council, shall refuse to depart from such Bays or Harbours; or if any Person or Persons shall refuse or neglect to conform to any Regulations or Directions

“ which shall be made or given for the Execution of any of the
“ Purposes of this Act; every such Person so refusing or otherwise
“ offending against this Act shall forfeit the Sum of Two Hundred
“ Pounds, to be recovered in the Superior Court of Judicature of
“ the Island of *Newfoundland*, or in the Superior Court of Judi-
“ cature of the Colony or Settlement within or near to which such
“ Offence shall be committed, or by Bill, Plaint or Information
“ in any of His Majesty’s Courts of Record at *Westminster*; One
“ Moiety of such Penalty to belong to His Majesty, His Heirs and
“ Successors, and the other Moiety to such Person or Persons as
“ shall sue or prosecute for the same: Provided always, that any
“ such Suit or Prosecution, if the same be committed in *Newfound-*
“ *land*, or in any other Colony or Settlement, shall be commenced
“ within Three Calendar Months; and, if commenced in any of His
“ Majesty’s Courts at *Westminster*, within Twelve Calendar Months
“ from the time of the Commission of such Offence.”

3. By Section 91 of the Act of the Imperial Parliament constituting the Dominion and Provincial Governments of Canada, known as “The British North America Act 1867,” it is provided, among other things, that the legislative authority of the Parliament of Canada shall extend to all matters coming within “Navigation and Shipping” and Sea-coast and Inland Fisheries.

4. By Act of the Parliament of Canada, Revised Statutes 1886, Chapter 94, sections 1, 2, 3 and 7, it is enacted as follows:—

“ 1. The Governor in Council may, from time to time, grant to
“ any foreign ship, vessel or boat, or to any ship, vessel or boat not
“ navigated according to the laws of the United Kingdom or of
“ Canada, at such rate and for such term not exceeding one year, as
“ he deems expedient, a license to fish for, take, dry or cure any
“ fish of any kind whatsoever, in British waters, within three
“ marine miles of any of the coasts, bays, creeks or harbours of
“ Canada, not included within the limits specified and described
“ in the first article of the convention between His late Majesty
“ King George the Third and the United States of America, made
“ and signed at London, on the twentieth day of October, one
“ thousand eight hundred and eighteen.

“ 2. Any commissioned officer of Her Majesty’s navy, serving
“ on board of any vessel of Her Majesty’s navy cruising and being
“ in the waters of Canada for the purpose of affording protection
“ to Her Majesty’s subjects engaged in the fisheries, or any com-
“ missioned officer of Her Majesty’s navy, fishery officer or stipen-
“ diary magistrate, on board of any vessel belonging to or in the

“service of the Government of Canada and employed in the
“service of protecting the fisheries, or any officer of the customs of
“Canada, sheriff, justice of the peace or other person duly com-
“missioned for that purpose, may go on board of any ship, vessel
“or boat within any harbour in Canada or hovering in British
“waters within three marine miles of any of the coasts, bays,
“creeks or harbours in Canada, and stay on board so long as she
“remains within such harbour or distance.

“3. Any one of the officers or persons hereinbefore mentioned
“may bring any ship, vessel or boat, being within any harbour in
“Canada, or hovering in British waters, within three marine miles
“of any of the coasts, bays, creeks or harbours in Canada, into port,
“and search her cargo, and may also examine the master upon
“oath touching the cargo and voyage; and if the master or person
“in command does not truly answer the questions put to him
“in such examination, he shall incur a penalty of four hundred
“dollars; and if such ship, vessel or boat is foreign, or not navigated
“according to the laws of the United Kingdom or of Canada,
“and (a) has been found fishing or preparing to fish, or to have
“been fishing in British waters within three marine miles of any
“of the coasts, bays, creeks or harbours of Canada, not included
“within the above mentioned limits, without a license or after
“the expiration of the term named in the last license granted to
“such ship, vessel or boat, under the first section of this Act, or (b)
“has entered such waters for any purpose not permitted by treaty
“or convention, or by any law of the United Kingdom or of Canada
“for the time being in force, such ship, vessel or boat and the
“tackle, rigging, apparel, furniture, stores and cargo thereof shall
“be forfeited.

“7. Every penalty or forfeiture under this Act may be re-
“covered or enforced in any Court of Vice-Admiralty within
“Canada.”

5. By the effect of the Colonial Courts of Admiralty Act 1890 (53-54 Vic., cap. 27, Imperial) and the Admiralty Act 1891 (54-55 Vic., cap. 29, Canadian) the jurisdiction of the courts of Vice-Admiralty within Canada was transferred to the Exchequer Court of Canada, which, from the date of the coming into force of the latter Act, became a colonial court of admiralty with jurisdiction throughout Canada.

6. On Monday afternoon, 25th May, 1896, Captain Charles Knowlton, a Fishery Officer of the Fishery Protection Service of Canada, in command of the Dominion Government cruiser *Aber-*

deen, found the United States fishing schooner *Frederick Gerring Jr.* in respect of which the claim herein is made, fishing, or to have been fishing or preparing to fish in British waters, upon the southern coast of Nova Scotia within less than two marine miles of the coast. The said schooner had, moreover, entered the territorial waters in which she was found for a purpose not permitted by treaty or convention, or by any law of the United Kingdom or of Canada then in force.

7. The said schooner at the time had a large purse seine set and attached to the schooner in which were a great number of live mackerel recently enclosed, and the crew or men belonging to the schooner were endeavouring to take these mackerel from the water into the schooner by means of dip-nets or ladles, which they were using from the schooner's deck.

8. The said schooner was occupying or making use of British territorial waters for fishing purposes contrary to treaty rights and the principles of international law.

9. Captain Knowlton, accordingly, pursuant to his instructions and in the due execution of his powers, seized the said schooner with her cargo and equipment and took her to Halifax, where Her Majesty caused an action to be instituted in the Exchequer Court of Canada for the Nova Scotia Admiralty District, a court of competent jurisdiction, for the forfeiture thereof, by writ issued out of the said court on 29th May, 1896 (Memorial, pages 17-19), and Edward Morris, the owner of the said schooner thereupon appeared in the said action, claiming the property sought to be forfeited, whereupon such further proceedings were had according to the practice of the said court that on 28th August, 1896, the said vessel with her cargo and equipment was for the causes aforesaid condemned as forfeited to Her Majesty (Memorial, pages 98-100).

10. The owner of the said schooner appealed from the said judgment to the Supreme Court of Canada, the final Court of Appeal within Canada, and according to the procedure of the said court filed in the said court his factum of appeal stating the alleged grounds of error in the judgment of the Exchequer Court. The Supreme Court, after hearing, dismissed the appeal and affirmed the judgment of the Exchequer Court.

11. No appeal was asserted from the judgment of the Supreme Court, which accordingly was and is final and conclusive.

12. Assuming the jurisdiction of the Exchequer Court to entertain the action and pronounce the judgment herein pleaded

the owner of the *Gerring* is finally barred and estopped, both under the laws of Canada and of the United States, from questioning the law or facts as determined or found by the said judgment; and it is submitted that the United States, claiming on behalf of the owner, are equally barred and estopped.

13. The fishing, or acts or operations connected with fishing, for which the *Gerring* was seized and condemned took place within Canadian territorial waters and were illegal and anti-conventional. The appropriate penalty was duly and conclusively adjudged by a Canadian Court of competent jurisdiction, the proceedings of which are, in the circumstances aforesaid, not subject to review by this honourable tribunal.

14. The judgment of the Supreme Court of Canada was subject to appeal to Her Majesty in Council, and it is submitted that the claimant should have exhausted his remedies existing under the laws of Canada, and, having failed to do so, that he cannot reasonably invoke through his Government the jurisdiction of this tribunal to inquire into and determine this claim.

15. It is denied that the purseseine of the *Frederick Gerring Jr.* was set or that the fish enclosed therein, and with which the vessel was engaged at the time of the seizure, were taken, caught or enclosed in the net outside the limit of British territorial waters, and it is averred on the contrary that the seine was set and that the operation of netting the fish took place wholly within three marine miles of the coast.

16. According to the case propounded by the United States the only evidence that the fishing operations for which the *Gerring* was condemned were begun beyond the limits of Canadian territorial waters is the statement of Captain McKenzie of the *Vigilant*, who also testifies that the *Gerring* was inside these limits when seized by the *Aberdeen*. There is apparently an interval of two hours or more between the time when the *Vigilant* passed the *Gerring* and the time when the *Aberdeen* came alongside of her, during which, if the position of the *Gerring* were as claimed by the United States, she must have moved about two miles nearer the coast. No sufficient reason is alleged to doubt the accuracy of the bearings and locality of the *Gerring* as determined by Captain Knowlton of the *Aberdeen* at the time of the seizure, and if, as thought by some of the witnesses whose testimony is printed, the *Gerring* could not in the existing conditions have drifted to that position from the place where the *Gerring* claims to have set her net, either she must during the interval have

moved voluntarily or Captain McKenzie must have been mistaken in the supposition that he was upon the line when he passed the *Gerring*, then preparing to fish. It will be perceived from the chart that the coast of Nova Scotia at the point in question is very broken and irregular and in large part composed of islands and of more or less isolated reefs and ledges. It is to be observed moreover that the master of the *Gerring*, although aware that he was in the immediate vicinity of the boundary line of territorial waters, took no bearings or other steps to ascertain or verify his position, and, as he himself truly said, "If he was put on oath he "could not swear if she was inside or outside of the limits; that he "had an old chart there that he could not depend on." (Memorial page 65).

17. By Canadian statute 54-55 Vic., cap. 95 (1891), sec. 1, it is provided that "The use of purse seines for the catching of fish in "any of the waters of Canada is prohibited, under penalty for each "offence of not less than fifty dollars, and not exceeding five "hundred dollars, together with the confiscation of the vessel, "boat and apparatus used in connection with such catching." The action of the master and crew of the *Gerring* in making use of a purse seine for the purpose of catching fish was therefore prohibited by the laws of Canada under penalty of forfeiture.

18. Some confusion is introduced by a question raised by the memorial of the United States as to whether the place of seizure was within the three mile limit according to the theory of measuring from a line drawn between two headlands. Consideration of this point does not however enter into the present case, because the *Gerring* was seized within two miles of the Gull Islands, an undoubted part of the coast of Nova Scotia, which, as already indicated, is very broken and irregular in the locality of the seizure. These islands are of considerable size, high above sea level, fairly covered with vegetation, and have been inhabited and used in fishing operations.

19. It is denied that the facts pleaded and the evidence submitted by the memorial afford any support for the claim herein either in accordance with treaty rights or with the principles of international law and of equity.

20. The damages claimed are inconsequential unreasonable and excessive.

APPENDIX.

ANNEX 1.

Certified copy filed.

IN THE EXCHEQUER COURT OF CANADA.

NOVA SCOTIA ADMIRALTY DISTRICT No. 73.

OUR SOVEREIGN LADY THE QUEEN

AGAINST

THE SHIP *FREDERICK GERRING Jr.*,
Her Cargo, Tackle, Rigging, Apparel, Furniture and Stores.

Take notice that I appear for Edward Morris of Gloucester, in the State of Massachussets, United States of America, the owner of the above named Schooner, her cargo, tackle, rigging, apparel, furniture and stores.

Dated the 3rd day of June, A.D. 1896.

Sgd. WILLIAM F. MACCOY,
Solicitor for Edward Morris.

My place of business is 37 Sackville Street, Halifax, N.S.

My address for service is said 37 Sackville Street.

ANNEX 2.

Certified copy filed.

IN THE EXCHEQUER COURT OF CANADA.

NOVA SCOTIA ADMIRALTY DISTRICT, No. 73.

OUR SOVEREIGN LADY THE QUEEN

AGAINST

THE SHIP *FREDERICK GERRING Jr.*,

Her Cargo, Tackle, Rigging, Apparel, Furniture and Stores.

Claim in behalf of Edward Morris of Gloucester in the United States of America, the owner of the ship or vessel *Frederick Gerring Jr.*, her cargo, tackle, rigging, apparel, furniture and stores.

1. I, John A. MacKasey of the City and County of Halifax Commission Merchant, make oath and say as follows:

2. I say the above named vessel with cargo, tackle, rigging, furniture and stores, as I am informed and verily believe, has recently been seized by the Captain of the Steamer *Aberdeen*, a vessel belonging to the Dominion Government and employed in the service of protecting the fisheries.

3. That I am the agent of the owner of said schooner, her cargo tackle, rigging, apparel, furniture and stores, in this behalf and as his agent and for and in behalf of the said Edward Morris, the owner of the vessel and goods so seized, claim the same as and being his property and improperly seized by the Captain of said *Aberdeen*, and that I am informed and to the best of my knowledge and belief the said vessel did not in any way violate any law or regulation of the Dominion of Canada or of any convention made by the British Government, and that of the United States of America or any law, regulation or convention made in relation to the fisheries in British waters.

4. That the said vessel is an American vessel schooner-rigged and built in the year 1870 and belongs to Gloucester in the United States of America.

5. That the name of the said schooner is the *Frederick Gerring Jr.*, that her owner is Edward Morris of Gloucester aforesaid, and that he resides therein, that his occupation is a Master Mariner and

that he has been and is now engaged at Gloucester aforesaid in the prosecution of the deep sea fishing.

6. I further say that the reasons stated in the endorsement of claim in the Writ of Summons herein have been read over to me and in answer thereto I am informed and verily believe that the same is untrue, and further that said vessel did not fish or catch any fish within three marine miles of any coast, bay, creek or harbour of Canada as I am informed and verily believe.

7. That I the said John A. MacKasey, an agent aforesaid, claim the liberation and return of said schooner and the other goods seized and that the Seizing Officer may be condemned in damages and costs for said wrongful seizure. On the 5th day of June, 1896, the said John A. MacKasey was duly sworn to the truth of this affidavit at Halifax, County of Halifax, before me

JOHN A. MACKASEY.

L. W. DESBARRES,
Registrar.

Exchequer Court,
Nova Scotia Admiralty District.

ENDORSEMENT.

EXCHEQUER COURT.

QUEEN & GERRING—CLAIM.

Filed 5th June, 1896.

ANNEX 3.

Certified copy filed.

Know all men by these presents, that I, John A. MacKasey, of the City and County of Halifax and Province of Nova Scotia, Commission Merchant, am held and firmly bound unto Her Majesty the Queen in the sum of two hundred and forty dollars for which sum well and truly to be paid to Her Majesty the Queen, her heirs or successors or her certain attorney, I bind myself, my heirs, executors and administrators firmly by these presents.

Sealed with my seal and dated at Halifax in the Province of Nova Scotia this 3rd day of June, A.D. 1896.

Whereas the schooner *Frederick Gerring Jr.*, belonging to Gloucester in the United States of America, and owned by one Edward Morris, of that place, master mariner, has recently been seized by the Captain of the steamer *Aberdeen*, employed in the service of Canada in protecting its fisheries, together with her cargo, tackle, apparel, furniture and stores for an alleged violation of the fishery laws of Canada, and has by warrant been arrested and placed in the Admiralty Court for the Province of Nova Scotia for adjudication and condemnation.

And Whereas it would appear that the owner of said schooner should file a claim to the property so seized and file a bond in the penal sum aforesaid in order to enable him to file such claim.

And Whereas the agent of the owner of said schooner on his behalf intends to file a claim as required by law and is now desirous of giving security in said penal sum to answer and pay costs occasioned by said claims.

Now know ye, that if the above bounded John A. McKasey, his heirs, executors or administrators shall and will, well and truly as such agent, file a claim as required by law and pay all such costs occasioned by such claim, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

Signed, sealed and delivered }
in presence of } (sgd.) John A. MacKasey (l.s.).

D. K. GRANT.

Endorsement
Exchequer Court
Queen }
vs. } Bond.
Gerring. }

Filed 5th June, 1896.

Approved—

W. B. A. RITCHIE.

ANNEX 4.

Filed in the Registry of the Supreme Court.

IN THE SUPREME COURT OF CANADA.

ON APPEAL

FROM THE

LOCAL JUDGE OF THE NOVA SCOTIA ADMIRALTY
DISTRICT.

Between

THE OWNER OF THE SHIP OR VESSEL *Frederick Gerring Jr.*,
her tackle, rigging, apparel, furniture and stores,
Defendants (*Appellants*),
and

HER MAJESTY THE QUEEN,
Plaintiff (*Respondent*).

APPELLANTS' FACTUM.

This is an action for the forfeiture of the above vessel and her cargo, tackle, apparel, furniture and stores for violation of a certain convention between his late Majesty King George the Third, King of the United Kingdom of Great Britain and Ireland, of the one part, and the United States of America of the other part, made on the 20th day of October, 1818, and for violation of the Act of Parliament of Great Britain and Ireland, made and passed in the 59th year George 3rd, being chap. 38 of the Acts of the last-named Parliament, made and passed in the said year.

Also for violation of chap. 94 of the Revised Statutes of Canada, made and passed by the Dominion of Canada.

Writ issued 29th May, 1896.

The above-named vessel and her cargo were arrested under warrant and still remain in custody.

The action of forfeiture was tried before the Honourable James McDonald, Local Judge of the Nova Scotia Admiralty district, on the 29th day of June last, and subsequent days, and from his judgment condemning the *Frederich Gerring, Jr.* and her cargo, etc. as forfeited, the present appeal is brought.

The alleged offence for which said ship or vessel and her cargo have been condemned is that being an American fishing vessel her master and crew on board of her fished for and took fish within the three marine miles of the coast of Nova Scotia, and the learned judge below found her guilty of that offence.

The substance of the convention of 1818, already referred to, is as follows:—

“A certain convention between His late Majesty George the Third, King of the United Kingdom of Great Britain and Ireland, and the United States of America was made and signed at London on the 20th day of October, 1818, and by the first article thereof after reciting that differences had arisen respecting the liberty claimed by the said United States for the inhabitants thereof to take, dry and cure fish on certain coasts, bays, harbours and creeks of His Britannic Majesty’s Dominions in America, it was agreed between the High contracting parties that the inhabitants of the said United States should have forever in common with the subjects of His Britannic Majesty the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks from Mount Joly, on the southern coast of Labrador, to and through the straits of Belle Isle and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson’s Bay Company; and that the American Fishermen should also have liberty forever to dry and cure fish in any of the unsettled bays, harbours and creeks of the southern part of the coast of Newfoundland above described and the coast of Labrador, but that so soon as the same or any portion thereof should be settled, it should not be lawful for the said fishermen to dry and cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors and possessors of the ground. And the said United States thereby renounced forever any liberty theretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on

“or within three marine miles of any of the coasts, bays, creeks or
 “harbours of His said Majesty’s Dominions in America not includ-
 “ed within the above mentioned limits; provided, however, that the
 “American Fishermen should be admitted to enter such bays or
 “harbours for the purpose of shelter and of repairing damages
 “therein or purchasing wood and of obtaining water, and for no
 “other purpose whatever. But that they should be under such
 “restrictions as might be necessary to prevent their taking, drying
 “or curing fish therein, or in any other manner whatever abusing
 “the privileges thereby reserved to them.”

The Imperial Statute 59, George III, c. 38. (1819) was passed to authorize the enforcement of this treaty. Sections 2 and 3 of that Act are as follows:

“2. And be it further enacted, That from and after the passing
 “of this Act it shall not be lawful for any person or persons, not
 “being a natural born subject of His Majesty, in any foreign ship,
 “vessel or boat, nor for any person in any ship, vessel or boat, other
 “than such as shall be navigated according to the laws of the
 “United Kingdom of Great Britain and Ireland, to fish for, or to
 “take, dry or cure any fish of any kind whatever, within three
 “marine miles of any coasts, bays, creeks or harbours whatever,
 “in any part of His Majesty’s Dominions in America, not included
 “within the limits specified and described in the First Article of the
 “said Convention, and hereinbefore recited; and that if any such
 “foreign ship, vessel or boat, or any persons on board thereof, shall
 “be found fishing, or to have been fishing, or preparing to fish
 “within such distance of such coasts, bays, creeks or harbours,
 “within such parts of His Majesty’s Dominions in America out
 “of the said limits as aforesaid, all such ships, vessels and boats,
 “together with their cargoes, and all guns, ammunition, tackle,
 “apparel, furniture and stores, shall be forfeited, and shall and may
 “be seized, taken, sued for, prosecuted, recovered and condemned
 “by such and the like ways, means and methods, and in the
 “same courts, as ships, vessels or boats may be forfeited, seized,
 “prosecuted and condemned for any offence against any laws re-
 “lating to the revenue of customs, or the laws of trade and navi-
 “gation, under any Act or Acts of the Parliament of Great Britain,
 “or of the United Kingdom of Great Britain and Ireland; Pro-
 “vided, that nothing in this Act contained shall apply, or be
 “construed to apply to the ships or subjects of any Prince, Power,
 “or State in amity with His Majesty, who are entitled by treaty
 “to His Majesty to any privilege of taking, drying, or curing

“fish on the coasts, bays, creeks or harbours, or within the limits in this Act described.”

“ 3. Provided always, and be it enacted, That it shall and may be lawful for any fisherman of the said United States to enter into any such bays or harbors of His Britannic Majesty’s Dominions in America, as are last mentioned, for the purpose of shelter and repairing damages therein, and of purchasing wood, and of obtaining water, and for no other purpose whatever; subject, nevertheless, to such restrictions as may be necessary to prevent such fishermen of the said United States from taking, drying or curing fish in the said bays or harbors, or in any other manner whatever abusing the said privileges by the said treaty and this Act reserved to them, and as shall for that purpose be imposed by any order or orders to be from time to time made by His Majesty in Council, under the authority of this Act, and by any regulations which shall be issued by the governor, or person exercising the office of governor, in any such parts of His Majesty’s Dominions in America, under or in pursuance of any such Order-in-council as aforesaid.”

The Canadian legislation on the same subject is contained in chapter 94 of the Revised Statutes of Canada, entitled; “An Act respecting fishing by foreign vessels.” Sections 2 and 3 of that Act are as follows:

“ 2. Any commissioned officer of Her Majesty’s navy, serving on board of any vessel of Her Majesty’s navy, cruising and being in the waters of Canada for the purpose of affording protection to Her Majesty’s subjects engaged in the fisheries, or any commissioned officer of Her Majesty’s navy, fishery officer or stipendiary magistrate, on board of any vessel belonging to or in the service of the Government of Canada, and employed in the service of protecting the fisheries, or any officer of the customs of Canada, sheriff, justice of the peace, or other person duly commissioned for that purpose, may go on board of any ship, vessel or boat within any harbor in Canada, or hovering in British waters within three marine miles of any of the coasts, bays, creeks, or harbors in Canada, and stay on board so long as she remains within such harbor or distance.”

“ 3. Any one of the officers or persons hereinbefore mentioned may bring any ship, vessel or boat, being within any harbor in Canada, or hovering in British waters, within three marine miles of any of the coasts, bays, creeks or harbors in Canada, into port, and search her cargo, and may also examine the master upon oath,

“ touching the cargo and voyage; and if the master or person in
“ command does not truly answer the questions put to him in such
“ examination, he shall incur a penalty of four hundred dollars;
“ and if such ship, vessel or boat is foreign, or not navigated
“ according to the laws of the United Kingdom or of Canada,
“ and (a) has been found fishing, or preparing to fish, or to have
“ been fishing in British waters within three marine miles of any
“ of the coasts, bays, creeks or harbors of Canada, not included
“ within the above mentioned limits, without a license, or after
“ the expiration of the term named in the last license granted to
“ such ship, vessel or boat, under the first section of this Act,
“ or (b) has entered such waters for any purpose not permitted by
“ treaty or convention, or by any law of the United Kingdom or
“ of Canada for the time being in force, such ship, vessel or boat,
“ and the tackle, rigging, apparel, furniture, stores and cargo
“ thereof shall be forfeited.”

The learned judge below found that the *Frederick Gerring, Jr.*, had been fishing within the territorial waters of Canada, near Liscomb Light off the south shore of Nova Scotia, viz., that having set her seine, caught the fish, and secured them by pursing up the seine and subsequently making it fast to the schr. *Gerring* and all done over half a mile outside of said waters, but while bailing the fish out of the seine she drifted inside of the limit through the action of the current, and then continued bailing inside of the limit, he held was fishing and condemned the vessel accordingly.

The evidence of the master and crew of the *Gerring* was not taken in court before the learned Judge, but was taken before the Registrar.

The plaintiff admitted that at the time the *Gerring* set her seine, caught the fish, pursed the seine up and fastened it to the vessel, she was a good half mile outside of the limit.

Captain Hector McKenzie of the Dominion fishery cutter *Vigilant*, in his testimony says that he saw the *Gerring* between four and half past in the afternoon near Liscomb.

He says when he first noticed her, the seine was set and pursed up and the fish were then caught and that his vessel (the *Vigilant*), was then inside of two hundred yards from the seine, that he took the bearings and found that the schooner, which at the time was fastened to her seine (which was then pursed up), was a good half mile outside of the three mile limit; that he took the bearings at the time and that Liscomb Light bore N.E. by N. $\frac{1}{2}$ N., and Little White Island—the middle part—N.W.

It was about one or one and one half hours after this that the Dominion cruiser *Aberdeen* seized her because it was alleged she was then inside of the three mile limit. The plaintiff admits that if she was inside of the three mile limit the only thing she did was to continue bailing the fish from the seine into the schooner. They also admit that from the time the seine was set until pursed up was only about ten minutes, and Capt. McKenzie says the reason he did not seize her was because she was outside the limit. The plaintiff's witnesses all admit that there was some wind from the eastward that afternoon, sufficient to enable the *Gerring* to run down to her seine and to enable the *Vigilant* to sail away to the westward, and also that the current was running westerly, or more correctly speaking southward and westward. It is also important to recollect that at the time the *Vigilant* left her and at the time she was seized, the *Gerring* was heading off shore. Captain Knowlton of the *Aberdeen* says that when he seized the *Gerring* it was between five and six o'clock p.m., so that according to his story she was an hour drifting over one mile. It was also admitted by the plaintiff, and indeed could not be denied, that if Capt. McKenzie was correct in his cross bearings at the time the *Gerring* was fastened to her seine and pursed up, then being outside of the limit, it was impossible that she could be in the position as stated by Capt. Knowlton at the time she was seized. A look at the chart will fully substantiate this position. It was impossible for the *Gerring* if she drifted at all, to drift in the direction of and be in the place where Capt. Knowlton says he found her. He says he took bearings at the place where he seized her, and that the north west point of Big White Island bore W.N.W., and Liscomb Light bore N.E. $\frac{1}{2}$ N., less than one mile and three quarters from Gull Ledge, so that she must have drifted about one and three-quarter miles in one hour to the N. by W. $\frac{1}{2}$ W., against a wind from the eastward and the current running to the S.W.—a thing impossible. It may be said this was a question for the court below. It is submitted that it is equally a question for the Court of Appeal, inasmuch as there is a contradiction between the two important witnesses for the Crown, and the defendant should not suffer for the mistake in Capt. Knowlton's bearings, for it is beyond doubt that if Capt. McKenzie's bearings are correct, then Capt. Knowlton's bearings must be wrong, and this was admitted. The defendant admits on the question of fact, the rule was in the Privy Council that the finding of the Court below in Admiralty matters is almost conclusive, and it will not reverse the finding unless it is convinced that it

is wrong, but it is submitted that that rule only applies where there is contradictory testimony between the plaintiff's and defendant's witnesses, and then only where all the witnesses have been examined before the judge. But the rule itself has been qualified.

In the collision case of the *John Ormston vs. Hallandia*, reported in the 'Shipping Gazette,' July, 1895, in the Court of Appeal, the Master of the Rolls giving judgment said, "even though there be nothing but contradiction in the evidence given in the Admiralty Court, it is quite true we are bound to listen to the evidence which is brought before us and to apply our minds to it. It has been laid down over and over again that where there is a difference of evidence as to facts in the Admiralty Court, the accuracy of one side or the other must depend in a great measure upon the demeanour of the witnesses. It has been laid down too, that in such cases those who appeal against the decision of the Admiralty Court as to the facts found by the Court can hardly succeed where there is a conflict of evidence, which conflict is to be determined by the demeanour of the witnesses, unless they can point out some undisputed fact or some fact as to which there is such a preponderance of evidence that the Court will treat it as an undisputed fact."

Here the undisputed and admitted fact is, that the *Gerring* was outside the line by over half a mile at the time she commenced to bail her fish out of the seine, that she was heading southerly off shore with her head sails down, her foresail and mainsail set, with both her booms well off to starboard, the wind to the eastward and making headway. She would have to make sufficient headway in order to keep ahead of her seine so as to bail the fish.

The other undisputed fact, according to the testimony of defendant's witnesses, is, it was impossible for the *Gerring* to drift towards or be found in the position where Captain Knowlton said he found and seized her. This evidence is not contradicted, but is supported by Knowlton, when he describes how the vessel was lying when he saw her and at the time of the seizure. Her head when Captain McKenzie left her, and the position of her sails were the same as when Knowlton seized her—with the wind from the east and fore and mainsails set, with the booms well over on the starboard side and she heading off shore, and the current running W. by S., how was it possible for her to maintain her head to the southward and drift N. by W. $\frac{1}{2}$ N., across and against wind and tide, and in a perfectly straight direction. It is submitted that the testimony of Captain Knowlton as to the position of the *Gerring* when seized is unreliable. It is quite true that

Captain McKenzie says the *Gerring* was inside the limits when seized, but it must be remembered that when he took his own bearings he was nearly two miles away and could not take them accurately, and a slight inaccuracy would make a great difference as to the *Gerring's* position. And while he says he himself drifted in, it must be remembered he was sailing close to the line heading west along the shore. Besides, his vessel being light would drift much easier, while the *Gerring* could not drift in shore because the weight of her seine in the water would prevent her, while the current would carry the seine and vessel with it. Capt. Knowlton was asked (p. 26, 1-24) how was the *Gerring* heading? Ans. I judge she was heading about S.S.W. I would judge so.—Q. Would she be heading off shore? A. Yes.—Q. In what direction, in your judgment, was the tide at that particular place? A. I think the tide would probably be westerly.—Q. That is off shore? A. It would be along the line of the shore.—Q. That is carrying her westerly? A. Yes.

Is this not conclusive that if she drifted at all she drifted westerly and if so, then Capt. Knowlton could not have found her where he says he did. If McKenzie is right in placing her at the time she pursed her seine up, then Knowlton is clearly wrong, and if Knowlton is right, then McKenzie is wrong. Which one of these two important crown witnesses is correct?

Captain Knowlton says there was a light draft of wind at the time from the east or east-south-east. And as regards the tide he says (p. 23, 1.40 and p. 24, 1.13) "It would be apt to send the *Gerring* to the westward slightly and set her along the coast." This is a clear admission from him that she did not drift from where McKenzie left her to the place he found her. She would be drifting along the shore instead of drifting N. by W. $\frac{1}{2}$ N., to the place where he says he found her. This would carry her to the southward and westward and away from the three mile line. Question put to Knowlton: "The question I asked was whether, in your judgment from the trend of the current, you would say that the seine had been set further away from Gull Ledge than it was at the time the fish were being taken out of it?" Answer: "Well, I think it would slightly." (p. 24, 1.7). From this it is clear that between the time McKenzie left her and Knowlton found her she had only drifted *slightly*, but in order to show she was inside the lines they must show she drifted nearly two miles in an hour. How could she do this if she only drifted slightly, especially in a N. by W. $\frac{1}{2}$ N. direction, and against the wind and tide with her

head sails down and her foresail and mainsail set, with the booms off to starboard (thus showing the wind was from the east) and her head off shore, or in other words, she was heading to the southward.

It is true Knowlton says he took the bearings at the time of the seizure and marked them on the chart. Is it not a strange and rather a suspicious thing that when the chart is produced at the trial the bearings were laid down on it not by Captain Knowlton but by Captain Spain, *the day after the seizure*, who was not present at the time and was away in another part of the province, and this is sworn to by Captain Knowlton. It may be said it was done under his direction, but surely, when an important seizure is made and by that act a person is to lose valuable property and be involved in ruin, the man who is to determine the spot where the offence is committed should himself (if he is capable) lay down that place on the chart, especially as he says "at the time I took the cross bearings I laid them down on the chart." Where is that chart? It was not produced.

But did Captain Knowlton take the bearings? He is asked (p. 27, l. 27): "Who took the bearings?" "My chief officer took them about the same time." Q. "Then did you take the chart?" A. "Yes, I laid it down on the chart."—Q. "On your own chart, on board your own ship before the seizure?" A. "Yes."—Q. "And this is what you put down at that particular time?" A. "These are the bearings."—Q. "When did you put these marks in red ink on this chart?" A. "I did not do that."—Q. "Who did it?" A. "Commodore Spain did it."

Captain Morin, first officer of the *Aberdeen*, in his direct examination says, (p. 32, l. 21): "Q. Had you anything to do in regard to taking the bearings?—A. The Captain (Knowlton) called me on the bridge, and asked me to ascertain by the compass the bearings of Liscomb Light. Q. Did you take the bearings of Liscomb light?—A. I did. Q. How was it bearing?—A. It was bearing N.E. $\frac{1}{2}$ N. Q. What did he say then?—A. He said take the bearings of Big White Island, and I did so. It was bearing W.N.W., i.e. the N.W. part of the island. Q. What did you do after you took the bearings?—A. The captain said she (the *Gerring*) was inside the limit." It will be thus seen that from this testimony and what follows, that Captain Knowlton never took the bearings at all, that it was done by one of his officers, and that he was on the bridge at the time they were taken, and this is also testified to by his third officer, and yet upon the testimony of this man the *Gerring* is to be forfeited and the owner ruined.

The learned judge below lays great stress on Captain Spain's testimony as corroborating Captain Knowlton as to the position of the *Gerring*, but it is submitted it is no corroboration on that point, because he was not there at the time, and his measurements of distances were made afterwards from the cross bearings given by Knowlton, and if these cross bearings were wrong all the measurements made by Spain would be incorrect. Captain Spain took no cross bearings except adopting the cross bearings of Knowlton in order to place his ship in the position of those cross bearings in order to make the measurements to the shore from them. Everything depends on the correctness of the cross bearings, and about that he admitted he knew nothing.

As to the construction of the Statutes and treaty:

No question arises as to the *Gerring's* having been found in any bay or harbour. The only question arising was whether she was fishing inside of three marine miles from the shore. Was she fishing? That question the learned judge below decided in the affirmative. The words of the treaty are "to take dry, or cure fish on or within three marine miles of the coast, etc."

The Imperial Statute 59, George III, Ch. 38, (1819), says "it shall not be lawful for any one but a natural born subject to fish for or take, dry, or cure any fish of any kind whatever, within three marine miles of the coast, etc.," and "that if any such foreign ship, or vessel, or boat or any person on board thereof shall be found fishing or having been fishing or preparing to fish within such distance of such coast, etc." it shall be forfeited.

The Dominion Act, Ch. 94 R.S., Canada, reads, "has been found fishing, or preparing to fish, or have been fishing in British waters, within three marine miles of any of the coasts, etc." The Treaty and Acts are all the same. It must be remembered that any vessel found in any bay or harbor, and within the three mile limit, is not liable to seizure unless she is found fishing or taking fish, preparing to fish or has been fishing in British waters. If she is found within the three mile limits not violating, or has not violated the treaty as above set forth she cannot be seized. The only thing that could be done by an officer would be to go on board of her and remain on board so long as she remained within such harbor, or distance and this is the only power given under section two of the Dominion Act.

The only offences are fishing, taking fish, preparing to fish, or having been fishing within the limits. It is evident these are separate and distinct offences, and it is submitted the mere bailing of

fish after they have been caught, and lifting them on to the deck of the vessel is not fishing, and is no offence.

According to Webster's dictionary, "fishing," is described as "an attempt to catch fish, to be employed in taking fish by any means." In other words it is the means used to catch the fish. Now the means used were the setting of the seine or net to catch the fish and when the fish are caught in meshes of it, then the seine is pursed up, that is both ends are drawn together thus forming the shape of a purse which encloses and secures the fish then taken in the seine. The vessel then runs down to the seine and both ends of it are made fast to a tackle, one on the foremast and one on the mainmast, and the seine is then hoisted well up and sufficiently high out of the water to enable the fishermen to bail the fish into the vessel. Surely the instant they are inclosed in the seine and it is pursed up they are "taken." They are then under the control and in the possession of the fishermen. If not then, it surely cannot be denied that after the seine is fastened to the vessel and hoisted in the way indicated, they are then reduced into the possession and control of the fishermen. Webster says "taking" is the act of gaining possession. When once the seine is pursed up and subsequently hoisted to bail, no fish can escape. They are as much the property of, and in the possession of the fishermen as if they were in the hold of the vessel. Suppose while the seine is made fast to the vessel a person cuts it, whereby the seine sinks to the bottom, would not an act of trespass lie against the wrongdoer for the loss of the fish? It is submitted it would. It is submitted therefore that "fishing" in this instance was the setting of the seine, the "taking" was the capturing the fish in it, and that they were reduced to the possession of the fishermen when enclosed in the seine when pursed, and became his property, and as all this was done outside the limit, the bailing of the fish, or taking them out of the net into the vessel afterwards was no offence. Even supposing the *Gerring* had drifted across the line.

Dated, Halifax, September 8th, 1891.

WILLIAM F. MACCOY,
Solicitor for Appellants.

ANNEX 5.

*Filed in the Registry of the Supreme
Court.*

RESPONDENTS FACTUM.

IN THE SUPREME COURT OF CANADA.

1896.

ON APPEAL FROM

THE NOVA SCOTIA ADMIRALTY DISTRICT OF THE
EXCHEQUER COURT.

BETWEEN

THE SHIP "FREDERICK GERRING, Jr.,"

HER CARGO, &c.,
(Appellants)

AND

OUR SOVEREIGN LADY, THE QUEEN,
Plaintiff, (Respondent.)

This is an action instituted by the Attorney General of Canada, on behalf, and in the name of Her Majesty the Queen; against the American fishing schooner *Frederick Gerring, Jr.*, her cargo, tackle, rigging, apparel, furniture and stores, for forfeiture of the same for fishing within the territorial waters of Canada or being therein for a purpose not permitted by Treaty or Convention; contrary to the provisions of (a), The first article of Treaty between his late Majesty King George the Third and the United States of America entered into on the 20th day of October, 1818: (b) Sections 2 and 3 of Chapter 36 of 59, George III, Chapter 38, (1819, Imperial) Passed for enforcing the first Article of said Treaty; (c), Section 3 of Chapter 94, of the Revised Statutes of Canada, entitled "An Act respecting Fishing by Foreign Vessels."

The action was instituted on the 29th day of May, 1896, by writ of summons issued out of the registry of the Nova Scotia

Admiralty District of the Exchequer Court of Canada at Halifax, Nova Scotia; and the *Frederick Gerring, Jr.*, and her cargo, tackle, rigging, apparel, furniture and stores were arrested under warrant issued in the action.

The cause was tried before the Honorable James McDonald, Local Judge of said Admiralty District on the 5th day of August, 1896, and a decree was made by said Local Judge on the 28th day of August, 1896, forfeiting the ship and her cargo, tackle, rigging, apparel, furniture and stores. From this decree the present appeal is brought by the owner of the *Frederick Gerring, Jr.*, her cargo, etc., to the Supreme Court of Canada.

The facts will be found stated in the judgment of the learned Local Judge printed in the case on appeal herein at pages 55 to 57. It is not questioned that the *Frederick Gerring, Jr.*, was an American fishing vessel, holding no Canadian license, and that she was engaged in bailing fish from her seine alongside her on the 25th day of May, 1896.

In the Court below there were only two questions raised by the present appellants; first, that the place where the *Frederick Gerring, Jr.*, was found taking fish out of her seine is not within three marine miles of the coast of Canada; and second, that the act of taking fish out of a seine within territorial waters is not fishing within such waters.

It is alleged on behalf of the Crown that the place where the *Frederick Gerring, Jr.*, was found bailing fish out of her seine was within three miles of Gull Ledge, an Island on the Eastern shore of Nova Scotia, near Liscomb in Guysborough County. It was not questioned in the Court below that Gull Ledge is part of the coast of Canada and, from the character of the island no such question can arise. See *The Anna 5*, Charles Robertson, page 373, as to the principles governing the construction of the term "coast." This case is accepted as authoritative by all the American writers' on International law. It is also not questioned that the place where the *Gerring* was found bailing fish out of her seine was without the limits in which the inhabitants of the United States are permitted to take fish by the Treaty of 1818.

I.

The question which the appellants raise under the first ground of defence urged before the Court below, and above referred to, is a pure question of fact, viz., whether the place where the *Frederick*

Gerring, Jr., was found bailing fish out of her seine was within three miles of Gull Ledge. This question of fact has been distinctly found in favour of the Crown by the Court below, and it is submitted that such finding is conclusive on this point under the well established principles governing the dealings of Courts of last resort with findings of fact. The *Frederick Gerring, Jr.*, was found bailing fish out of her seine by the Dominion Fishery Cruiser *Aberdeen*, and the evidence of the officers of the *Aberdeen* is distinct and unequivocal as to the bearings of the locality where the *Gerring* then was. And it has been clearly proved, and is not questioned, that if the *Gerring* was in the position testified to by the officers of the *Aberdeen* she was within three miles of Gull Ledge.

This evidence together with that of Captain McKenzie of the Dominion Fishery Cruiser *Vigilant*, which was also in the vicinity, clearly established that the locality in question was within three marine miles of Gull Ledge.

On behalf of the appellants the only evidence produced as to this question of fact was that of the Master and crew of the *Frederick Gerring, Jr.* and certain opinion evidence given by nautical experts called on behalf of the appellants.

The Master and crew of the *Frederick Gerring, Jr.* were unable to give any evidence of the bearings of their vessel at the time; and could only guess at her distance from the shore, and it is contradicted that the Master of the *Frederick Gerring, Jr.* stated before the trial that he could not swear whether his vessel was inside or outside the limit. See page 35, l. 20. The expert evidence produced on behalf of the appellants will be found on examination to be wholly unreliable as a basis for establishing the position of the *Frederick Gerring, Jr.* at the time when she was found taking fish out of her seine by the Captain of the *Aberdeen*. And it is submitted that the learned judge below could not have done otherwise than accept the positive evidence as to the place where the ship was; rather than the opinions of the few experts, whom the appellants were able to find willing to say; that in their judgment it was improbable or impossible, in view of the position of the vessel a short time before, that she could have been at the place where it is proved she was about six o'clock p.m. on the 25th day of May, 1896.

II.

The other question raised on behalf of the appellants is as before mentioned whether the acts proved by the witnesses on behalf of the Crown constitute fishing. The words of the treaty of 1818 are: "And the said United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors of His said Majesty's Dominions in America not included within the above mentioned limits."

By section 2 of 59 George III Chapter 38, (Imperial) it is enacted: "that it shall not be lawful for any person in any ship, vessel or boat, other than such as shall be navigated according to the laws of the United Kingdom of Great Britain and Ireland, to fish for, or to take, dry or cure any fish of any kind whatever, within three marine miles of any coasts, bays, creeks or harbours whatever, in any part of His Majesty's Dominions in America, not included within the limits specified and described in the First Article of said Convention and hereinbefore recited; (i.e., the Treaty of 1818), and that if any such foreign ship, vessel or boat, or any persons on board thereof, shall be found fishing, or to have been fishing, or preparing to fish within such distance of such coasts, bays, creeks or harbours, within such parts of His Majesty's Dominions in America, out of the said limits aforesaid, all such ships, vessels and boats, together with their cargoes, and all guns, ammunition, tackle, apparel, furniture and stores shall be forfeited."

And by section 3 of Chapter 94 of the Revised Statutes of Canada, it is enacted that if any foreign vessel is within any harbour in Canada, or hovering in British waters, within three marine miles of any of the coasts, bays, creeks or harbours in Canada and "(a) has been found fishing or preparing to fish, or to have been fishing in British waters within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, not included within the above mentioned limits, without a license, or after the expiration of the term named in the last license granted to such ship, vessel or boat, under the first section of this Act, or (b) has entered such waters for any purpose not permitted by treaty or convention, or by any law of the United Kingdom or of Canada for the time being in force, such ship, vessel, or boat, and the tackle, rigging, apparel, furniture, stores and cargo thereof shall be forfeited."

The question now to be determined is the construction to be put upon the word "fishing" used in the treaty and in the statutes referred to.

Fishing, is a continuous act and is going on from the time when a man begins to lure fish until he finally secures them in his basket or boat.

Dealing with distinct acts constituting together one crime it is laid down in Bishop on Criminal Law (7th Edition) Section 650 that:

"Where several acts constitute together one crime, if each is separately performed by a different individual in the absence of the rest, all are principals as to the whole. For example, where forgery is a statutory felony, if persons make distinct parts of a forged instrument, each is a principal as to the whole, even though he does not know by whom the other parts are executed, and one finishes it alone while the rest are absent. Were the law not so, no one could be punished; for a person whose own hand does the criminal act, either wholly or in part, is not an accessory."

Rex vs. Bingley, Russell & Ryan 446, was an indictment for forging bank notes, in which the question was: whether two of the prisoners who forged parts of the notes, which were incomplete when they left their hands, and who were not present when they were completed, were principals or accessories. Mr. Justice Richardson at the trial, after referring to some authorities to the effect that persons concerned in the uttering of forged paper but not present at the uttering are not principals, says:—

"These, however, are all cases of uttering where the offence consists of one single fact which is carried into execution by the principal alone, and where the accessory takes no other part than that of previously instigating the principal to execute. *Quære* whether the same doctrine is applicable to the offence of forging, which is a complicated offence, consisting of several parts, and executed, (as in this case) by several different agents, each executing his own part, and all parts being equally essential to the completion of the offence? Unless in such cases all are principals, the law seems to reach only the party who performs the last operation, and thereby makes the forged instrument complete (viz. in this case the party who added the signature, and in the case of a forged deed the party who adds the seal), who may be one of the least active and the least guilty of the parties concerned."

The question was reserved by Mr. Justice Richardson and heard

before all the Judges. "They held that the conviction was right "as to all the prisoners; the judges were of opinion that as each "of the prisoners acted in completing some part of the forgery, "and in pursuance of the common plan, each was a principal in "the forgery; and that, although the prisoner Batkin was not "present when the note was completed by the signature, he was "equally guilty with the others."

This principle has been applied by the English courts to the very act of fishing now under consideration. In *Rüther vs. Harris*, 1 Ex. D. 97, it was held that when a person had set a net for the purpose of catching salmon on Sunday, such net was properly forfeited under a statute which provided that: "No person shall "fish for, catch or kill by any means other than a rod and line "any salmon between 12 o'clock at noon on Saturday and 6 o'clock "on Monday morning; and any person acting in contravention of "this section shall forfeit all fish taken by him and any net or "movable instrument used by him in taking the same."

In *Short vs. Bastard*, 46 J.P. 580, it was held under a statute prohibiting fishing for salmon, except with a net having meshes of a certain size, that as the net used was calculated to catch salmon it was immaterial whether salmon were caught or intended to be caught or not.

In the opinion of the law officers of the Crown in relation to the Treaty of 1818, given August 30th, 1841, the opinion was expressed that casting bait to lure fish in the track of any American vessel navigating the Gut of Canso would constitute a fishing within the negative terms of the Treaty.

These authorities will serve to show how remote from the completion of a continuous act, an act forming part of it may be in order to come within the terms of a prohibition against the commission of the continuous act.

It seems, however, to Counsel for the respondent that it is unnecessary to resort to such authorities when the act proved is the end and completion of the continuous act, because, as is stated by Mr. Justice Richardson in *Rex vs. Bingley*, if a different construction of the prohibition of a continuous act were adopted, it would apply only to the last operation, which in the present case the act proved was.

And it is submitted, on behalf of the respondent, that no clearer act of fishing can be imagined than the act of hauling fish on board a vessel from a line or bailing them on board from a net.

The contention on behalf of the appellants in the Court below on this point went further than saying that taking fish out of a net was only a part of the act of fishing, and it was urged that the fishing was complete before the fish were taken out of the net. It was contended that the act of fishing is complete when in line fishing the fish is hooked, or in net fishing, is surrounded by a net. According to this contention, a fish would be caught as soon as it is hooked, which would, I think, be found to be contrary to experience.

It is submitted that fish caught in a net on the high seas and still in the water are not in the possession in any sense of the fisherman; but assuming that they are to be so regarded, and that property in them is thereby vested in the fisherman his title is qualified, a special interest liable to be divested before they are killed by the escape of the fish.

See Blackstone's Commentaries, 15th Edition, page 403.

Kent's Commentaries Text Book Series, page 348.

It is submitted that the acquiring of this special and very precarious right is not, in the ordinary use of language, the completion of the act of fishing, but that something more remains to be done before the fishing is completed and the fish finally taken.

It is laid down by Vattel that "in the interpretation of treaties, "compacts and promises, we ought not to deviate from the common "use of the language, unless we have very strong reasons for it."

But considering the words used in connection with the context and subject matter will very strongly support the construction contended for on behalf of the respondent, it may be noted that laws passed for the protection of the public such as revenue laws are not to be regarded as penal laws in the sense of requiring them to be constructed with strictness in favour of the defendant. "They "are regarded rather in their remedial character as intended to "prevent fraud, supreme public wrong and promote the public "good and are to be so construed as to most effectually accomplish "those objects."

Maxwell on Statutes, 2nd Edition, page 351.

See Chiquot Champagne 3 Wallace 145.

Endlich on Statutes, Section 346.

Looking first at the first article of the Treaty of 1818, which is recited in 59, George III, Chapter 38 (Imperial), and will be found in extenso in Stockton's Admiralty Reports, page 204; it recites that differences have arisen in reference to the liberty claimed by Americans to take, dry and cure fish in the territorial

waters of British North America, and gives fishing rights to Americans within certain limits and the United States renounce forever the liberty to take, dry or cure fish in such waters outside said limits.

The Treaty contains a proviso that American fishermen shall be admitted to enter such territorial waters for shelter, repair, purchasing wood and obtaining water and for no other purpose whatever, under restrictions necessary to prevent them from taking, drying or curing of fish or in any other manner whatever abusing such privilege.

The Statute of 59 George III, by section 2, declares that it shall be unlawful in any foreign vessel "to fish for or to take, dry or cure fish" in the territorial waters of British North America, outside the limits mentioned in the Treaty. And further enacts that if such vessel "shall be found fishing, or to have been fishing, or preparing to fish," within such waters such vessel shall be forfeited.

The word "fishing," it is submitted, is intended to include all the acts which are declared unlawful by the preceding portion of the section. After making this declaration of unlawful acts and enactment of forfeiture, the Statute proceeds:

"3. Provided always, and be it enacted, that it shall and may "be lawful for any fishermen of the said United States to enter "into any such bays, or harbours of His Britannic Majesty's "Dominions in America, as are last mentioned, for the purpose "of shelter and repairing damages therein, and of purchasing "wood and of obtaining water, and for no other purpose what-ever; subject nevertheless to such restrictions as may be necessary "to prevent such fishermen of the said United States from taking, "drying or curing fish in the said bays or harbours, or in any other "manner whatever abusing the said privileges by the said Treaty, "and this Act reserved to them, as shall for that purpose be imposed" by Order-in-Council, &c.

The Statute it will be seen is intended to prevent not only the taking by American fishermen of fish which are within territorial waters but also to prevent their using such waters for purposes other than those expressly permitted. To effectuate this intention a construction should be put upon the word "fishing" which will prevent as far as possible the use of territorial waters for unauthorized purposes. That "fishing" is used as including all prohibited acts is further indicated by the fact that the liberty accorded American fishermen is introduced as a proviso.

The easy means of evasion of the Statute, which would be caused by the appellants construction of the word "fishing" must also be considered.

"It is the duty of the judge to make such construction as shall suppress all evasions for the continuance of the mischief. To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner, that which it has prohibited or enjoined."

Maxwell on Statutes, 2nd Edition, page 133.

If it is incumbent upon the Crown to prove when an American fisherman is taking fish out of a net within territorial waters near the high seas that the fish came into the net in territorial waters, or to disprove statements of the fishermen that the fish came into the net on the high seas, the punishment of violations of the law in such cases would be impracticable.

III.

Assuming that the act of the fishermen on the *Frederick Gerring Jr.* in taking fish out of their seine was not fishing, the vessel was nevertheless properly forfeited for being, in violation of the Treaty and statutory prohibitions, in territorial waters for a purpose not permitted by Treaty or Convention. The Imperial Statute; and the Canadian Statutes 31 Victoria, Chapter 61, (1868), and 33 Victoria, Chapter 15, (1870), which like the Imperial Statute expressly authorize forfeiture, only for fishing or preparing to fish, have been held to authorize such forfeiture. Upon this construction of the Imperial Statute in 1839, the *Java*, *Independence*, *Magnolia* and *Hart* were seized and confiscated, the principal charge being that they were within British American waters without legal cause. In 1840 the *Papineau* and *Mary* were seized and sold for purchasing bait. In 1849 the *Charles* was seized and condemned in the Vice Admiralty Court in New Brunswick for having resorted to a harbour of that Province after warning and without authority. The *J. H. Nickerson* was forfeited by the Vice Admiralty Court at Halifax, for having on the 30th of June, 1870, entered the territorial waters of Canada for a purpose not permitted by Treaty or Convention, namely, to purchase bait.

The *J. H. Nickerson* Young's Admiralty Decisions, page 56.

The *David J. Adams* was also forfeited by the Vice Admiralty Court at Halifax for having on the 6th day of May, 1886, entered the waters of Canada for the purpose of purchasing bait.

To remove doubts as to the right as to forfeit American fishing vessels for violation of the Treaty and Imperial Statute, otherwise than by fishing or preparing to fish, the Statute of Canada 49 Victoria, Chapter 114 (1886), was passed, which is now embodied in Section 3 of Chapter 94, Revised Statutes of Canada. This Statute was reserved by the Governor General, for the signification of the Queen's pleasure thereon and was assented to by Her Majesty by Order-in-Council on the 26th day of November, 1886, and proclamation thereof was made on the 24th day of December 1886.*

By that Statute any foreign vessel which has entered the territorial waters of Canada for a purpose not permitted by Treaty or Convention is declared liable to forfeiture. American fishing vessels are by the Treaty of 1818 expressly prohibited from entering the territorial waters of Canada without the limits mentioned in the Treaty except for wood, water, shelter or repairs, and it cannot be pretended, on the evidence that the *Frederick Gerring, Jr.* entered the waters of Canada for any of these purposes. If she was not fishing, she entered the waters of Canada for the purpose of taking fish out of her seine therein, a purpose not permitted by Treaty or Convention.

Halifax, N.S., September 16th, 1896.

W. B. A. RITCHIE,
Solicitor of the Attorney General of Canada.

ANNEX 6.

Certified copy filed.

LANSDOWNE,

CANADA.

VICTORIA, by the Grace of God, of the United Kingdom of Great
 Britain and Ireland QUEEN, Defender of the Faith,
 &c., &c., &c.

(L. S.)

*To Captain Charles T. Knowlton, of Parrsboro', in the Province of
 Nova Scotia, in Our Dominion of Canada, Master Mariner,*

GREETING:

Know you, that reposing trust and confidence in your loyalty, integrity and ability, We have constituted and appointed, and We do hereby constitute and appoint you the said Charles T. Knowlton to be a Fishery Officer in the Fisheries Protection Service, and to the command of any vessel in such service to which you may be, by Our Minister of Marine and Fisheries assigned for duty.

To have, hold, exercise and enjoy the said office of a Fishery Officer in the Fisheries Protection Service, and the command of any vessel in such service to which you may be, by Our Minister of Marine and Fisheries, assigned for duty unto you the said Charles T. Knowlton, with full authority to exercise the powers of a justice of the Peace for all the purposes of "The Fisheries Act" and the regulations made or continued thereunder or in respect thereto, and with all and every the powers, rights, authority, privileges, profits, emoluments and advantages unto the said office of right and by Law appertaining during pleasure.

In testimony whereof We have caused these our Letters to be made Patent and the Great Seal of Canada to be hereunto affixed: Witness, Our Right Trusty and Entirely beloved Cousin The Most Honourable Sir Henry Charles Keith Petty Fitzmaurice, Marquis of Lansdowne, in the County of Somerset, Earl of Wycombe of Chipping Wycombe, in the county of Bucks, Viscount Calne and Calnstone, in the County of Wilts, and Lord Wycombe, Baron of Chipping Wycombe, in the County of Bucks in the

Peerage of Great Britain, Earl of Kerry and Earl of Shelburne, Viscount Clanmaurice and Fitzmaurice, Baron of Kerry, Lixnaw and Dunkerron, in the Peerage of Ireland; Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George; Governor General of Canada and Vice-Admiral of the same.

GEO. W. BURBIDGE,
Deputy of the Minister of Justice, Canada.

At Our Government House, in Our City of Ottawa, this Twenty-Fifth day of April in the year of Our Lord, One Thousand Eight Hundred and Eighty-Seven, and in the Fiftieth year of Our Reign.

By command,

G. POWELL,
Under Secretary of State.

ANNEX 7.

Certified copy filed.

STANLEY OF PRESTON.

CANADA.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c., &c., &c.

(L. S.)

To Hector McKenzie of Pictou, in the County of Pictou, in the Province of Nova Scotia, in Our Dominion of Canada, Esquire.

GREETING:

Know you that reposing trust and confidence in your loyalty, integrity and ability, We have constituted and appointed, and We do hereby constitute and appoint you the said Hector McKenzie to be a Fishery Officer in the Fishery Protection Service, and to the Command of any vessel in such service to which you may by Our Minister of Marine and Fisheries be assigned for duty.

To have, hold, exercise and enjoy the said office of a Fishery Officer in the Fishery Protection Service and the command of any vessel in such service to which you may be assigned as aforesaid, unto you the said Hector McKenzie, with full authority to exercise the powers of a Justice of the Peace for all the purposes of "The Fisheries Act" and the regulations made or continued thereunder and in respect thereto, and with all and every the powers, rights, authority, privileges, profits, emoluments and advantages unto the said office of right and by law appertaining during Pleasure.

In Testimony whereof, we have caused these Our Letters to be made Patent, and the Great Seal of Canada to be hereunto affixed, WITNESS, Our Right Trusty and Well Beloved the Right Honourable Sir Frederick Arthur Stanley Baron Stanley of Preston, in the County of Lancashire, in the peerage of the United Kingdom, Knight; Grand Cross of Our Most Honourable Order of the Bath; Governor General of Canada,

ROBT. SEDGEWICK,
Deputy of the Minister of Justice, Canada.

At Our Government House, in Our City of Ottawa, this sixteenth day of September, in the year of Our Lord one thousand eight hundred and ninety, and in the Fifty-fourth year of Our Reign.

By Command,

L. A. CATELLIER,
Under-Secretary of State.

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